the plaintiff may elect whether he will plead specially on the contract, or generally, using the common counts.[12] But so long as the contract remains executory, or a condition precedent remains unperformed, the plaintiff must declare specially.[13] If the mode of payment is other than in money, the count must be on the original contract.[14] And if a term of credit be given, the action may not be brought on the common count until such term has expired.[15] The common count may also be used where the contract, though partly performed, has been rescinded, or the complete execution thereof was prevented by the defendant,[16] or where it appears that what was done by the plaintiff was done under a special agreement, but not in the stipulated time or manner, and yet was beneficial to the defendant, and has been accepted and enjoyed by him.[17]

H. L. K.

TRUSTS: POWER TO REVOKE IN ABSENCE OF AN EXPRESS POWER OF REVOCATION.—*Gray v. Union Trust Company of San Francisco*[1] presents a situation novel in California. Miss Gray conveyed certain real and personal property to the defendant upon the following trusts: first, the net income of the property, less the cost of administration, was to be paid to the settlor during her life; second, upon her death, the entire property was to be divided among her heirs according to the laws of succession of the state of California as they existed at the time of the conveyance, with a power reserved to the settlor to make different provision as to the ultimate disposition of the property by her last will. Later Miss Gray repented having created the trust and wished to revoke it. The question to be decided was whether she might do this in the absence of a reservation of a power of revocation.

Courts of equity have a discretionary power to terminate a trust, but this power is never to be exercised unless every beneficiary under the trust is before the court and consents to the decree.[2] The inquiry in this case reduces itself to a determination of the question, who were the beneficiaries under the trust.

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[12] Leeke v. Hancock, supra, n. 3; Donegan v. Houston, supra, n. 7.

[13] O'Connor v. Dingley (1864), 26 Cal. 11; Barrere v. Somps (1896), 113 Cal. 97, 45 Pac. 177; Roche v. Baldwin (1902), 135 Cal. 522, 67 Pac. 903; Davisson v. East Whittier Land Co. (1908), 153 Cal. 81, 96 Pac. 88.

[14] O'Connor v. Dingley, supra, n. 12.

[15] By way of dictum in Castagnino v. Balletta (1889), 82 Cal. 250, 23 Pac. 127.

[16] Brown v. Crown Gold Mining Co. (1907), 150 Cal. 376, 89 Pac. 86; Breen v. Roy (1908), 8 Cal. App. 475, 97 Pac. 170.

[17] Castagnino v. Balletta, supra, n. 14; Donegan v. Houston, supra, n. 7; Naylor v. Adams (1911), 15 Cal. App. 548, 115 Pac. 335.

[1] (Dec. 31, 1915), 51 Cal. Dec. 16, 154 Pac. 306.

[2] Eakle v. Ingram (1904), 142 Cal. 15, 75 Pac. 566, 100 Am. St. Rep. 99; Godfrey v. Roberts (1903), 65 N. J. Eq. 323, 55 Atl. 353; In re Harrar's Estate (1914), 244 Pa. 542, 91 Atl. 503.

Obviously if the life cestui were the sole beneficiary, the court should grant her prayer. The only other possible beneficiaries were the "heirs at law according to the laws of succession of the state of California as they now exist," who were to take in default of the exercise of the power of appointment.

The principal case holds that these persons are beneficiaries under the trust. In a case like this, no importance is to be attached to the voluntary nature of the trust as that goes to the creation of the trust.[3] The validity of the trust is granted; the question turns on the nature of the future interests involved. The rule in Shelley's Case is not applicable because that rule has been abolished in California,[4] and furthermore the limitation here is not within the terms of that ancient rule. The situation is cleared up by determining the capacity in which the class provided for as ultimate beneficiaries takes: if the members of the class take as heirs, they have not any present vested interest;[5] if they take as remaindermen, they have.[6] For a class to take as heirs, the qualifications requisite to membership in that class can only be determined at the time of the ancestor's death, because it is only at the time of death that one has heirs. But in the principal case, the qualifications for membership in the designated class were fixed by reference to the laws of succession of the state of California as existing at the date of the conveyance. It is not necessary that the individual members of the class be determined so long as the qualifications are fixed. Consequently the ultimate beneficiaries in the principal case would not take as the heirs of Miss Gray but as remaindermen. They, therefore, held, as a class, a present interest and their consent was necessary to a revocation of the trust. It

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[3] Holmes v. Holmes (1911), 65 Wash. 572, 118 Pac. 733; Wallace v. Industrial Trust Co. (1909), 29 R. I. 550, 73 Atl. 25; Lovett v. Farnham (1897), 169 Mass. 1, 47 N. E. 246. Some courts look upon the absence of a reserved power of revocation in a voluntary trust as evidence of mistake. Ewing v. Wilson (1892), 132 Ind. 223, 31 N. E. 64, 19 L. R. A. 767; Garnsey v. Mundy (1873), 24 N. J. Eq. 243, semble. The English rule is in accord with the doctrine that consideration has nothing to do with revocability. Newton v. Askew (1848), 11 Beav. 145, 50 Eng. Rep. R. 772.

[4] Cal. Civ. Code, § 779. The rule in Shelley's case has been abolished in many American jurisdictions. See Washburn on Real Property, 6th ed., vol. 2, § 1616.

[5] The estate of an heir is obviously not a present estate and certainly the heir has no present rights against the ancestor during the latter's lifetime.

[6] Watson v. Cressey (1887), 79 Me. 381, 10 Atl. 59. A remainderman can invoke the aid of a court of equity to protect his interest. Taylor v. Adams (1912), 93 Mo. App. 277. The distinction drawn in the note is exemplified in cases in the New York Supreme Court: Goodwin v. Broadway Trust Co. (1914), 149 N. Y. Supp. 1033, 87 Misc. Rep. 130; Whittmore v. Equitable Trust Co. (1914), 147 N. Y. Supp. 1058, 162 App. Div. 607; Crackanthorpe v. Sickles (1913), 141 N. Y. Supp. 370, 156 App. Div. 753.

must be noted in this situation that the trust is irrevocable until the settlor's death, because the members of the class are not fully determined until that time, and it is, therefore, impossible to have them all before a court until the instant of the life cestui's death.

The case seems hard upon the settlor, but she is in the same position as one who has made a valid gift. In such a case the donor cannot afterwards demand a return from the donee. Here the donor made a gift of equitable estates by means of an executed valid trust, and should not be allowed to revoke her gift because later she became dissatisfied with what she had done.[7]

R. S. M.

WILLS: REPUPLICATION BY CODICIL: EFFECT THEREOF.—In California the will of a man is not as is the case of the will of a woman[1] revoked ipso facto by his marriage, but remains in a state of suspended animation, becoming void only in the event that the wife survives the husband.[2] Before such time, if the will is confirmed or republished by a codicil, it becomes a post nuptial will and therefore is not revoked by the predecease of the husband. The reason for this was expressed in *Estate of Cutting,*[3] which, adopting the words of the earliest California case on the subject,[4] declared that the ante-nuptial will and the codicil "are to be regarded as forming but one instrument, speaking from the date of the codicil."

The principal case was strictly a case of republication, as distinguished from revival or incorporation by reference. Technically revival restores a revoked will or codicil; republication confirms an unrevoked testamentary instrument and makes it operate as if executed as at the date of the republication;[5] while in the case of incorporation by reference an instrument which never was testamentary in character is made a part of a validly executed will or codicil.[6]

Under the common law there was no set form for republication or even revival. But now in England and in most of the American

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[7] Where valid remainders, contingent or vested, are found, termination should not be decreed. Crackanthorpe v. Sickles, supra, n. 6; Sands v. Old Colony Trust Co. (1907), 195 Mass. 575, 81 N. E. 300; Skeen v. Marriott (1900), 22 Utah, 73, 61 Pac. 296; Kraft v. Neuffer (1902), 202 Pa. 558, 52 Atl. 100; Lovett v. Farnham, supra, n. 3.

[1] Cal. Civ. Code, § 1300. Prior to 1905 such was not the case as respects the will of a married woman. Estate of Comassi (1895), 107 Cal. 1, 40 Pac. 15.

[2] Cal. Civ. Code, § 1299.

[3] (Feb. 28, 1916), 51 Cal. Dec. 290, 155 Pac. 1002.

[4] Payne v. Payne (1861), 18 Cal. 291, 302.

[5] Estate of Cutting, supra, n. 3; Estate of McCauley (1903), 138 Cal. 432, 71 Pac. 512; Estate of Ladd (1892), 94 Cal. 670, 30 Pac. 99; Payne v. Payne, supra, n. 4.

[6] See 2 California Law Review, 164. In Estate of Plumel (1907), 151 Cal. 77, 90 Pac. 192, 121 Am. St. Rep. 100, the court notes that there is a difference between incorporation by reference and republication.